IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 72 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
CHANDRA VILAS HOTEL - Respondent(s)

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Appearance :
MR BB NAIK for Applicant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 18/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Mr. B.B. Naik, learned counsel for the Revenue. None for the assessee, though served.

2. Present is a Reference under Section 256(1) of the Indian Income Tax Act by the Income Tax Appellate Tribunal, Ahmedabad Bench 'A', at the instance of the Revenue on the following question for our opinion;

> 'Whether the Appellate Tribunal is right in law and on facts in cancelling the penalty levied u/s. 271(1)(c) of the Act when no correct and complete accounts were maintained and the book results had been rejected from year to year and substantial additions made were accepted by the assessee and that inspite of this the assessee persisted in maintaining the books of account in the same way ?'

3. The short facts, leading to the present Reference, are that the assessee who is in the hotel business, for the accounting year 1967-68, submitted its returned income, the I.T.O. noted that the assessee had disclosed the total sales of Rs. 19,55,651/- as compared to Rs. 17,70,504/- for the earlier year but the gross profit was reduced to 24% in comparison to 31.6% for the last year. He also found that

the manner in which the accounts were maintained the income could not be properly estimated and while doing so he also observed that the Auditors of the assessee had clearly observed that for the check income or for the test income of the particular day the required slips were not produced before the Auditors. The Assessing Officer held that the income was not properly returned, he accordingly applied Section 145(1) of the Indian Income Tax Act, and assessed the income by adding 20% more to the returned income. The fact of addition was not disputed by the assessee and it felt content with the said order.

4. The Assessing Officer, thereafter, started penalty proceedings under Section 271(1) of the Act and, after finding that the penalty would be more than Rs.100, he referred the matter to the Inspecting Assistant Commissioner ('IAC' for short). The IAC, after giving proper opportunity of hearing to the parties, observed that present was a fit case for imposition. The matter was taken before the Tribunal which held in favour of the assessee and observed that in view of the bonafide conduct of the assessee no penalty could be imposed. At the instance of the Revenue, the matter was referred to this Court, which was registered as 'ITR No. 125 and 126 of 1978'. The matter was finally heard and disposed of by a Division Bench of this Court by order dated 28th March 1986. The said Judgment stands reported in 1987 Vol. 165 ITR Page

300. The Division Bench of the High Court found that the Tribunal was unjustified in holding that the penalty could not be imposed. The High Court made various observations in its order including the observation that the approach of the Tribunal, in examining the question whether levy of penalty was justified, was erroneous and illegal. The High Court observed that in penalty proceedings the burden was upon the assessee to prove that he acted bonafide and there was no fraud or misrepresentation on his part and for those reasons the penalty could not be imposed. The High Court, after recording its deliberated findings, observed that the matter deserved remand to the Appellate Tribunal for a fresh decision by the Tribunal.

5. The matter was again heard by the Tribunal, and, this time, again the Tribunal has observed that the penalty proceedings were unjusified.

6. Mr. Naik, learned counsel for the Revenue, submits that a perusal of the Judgment of the Tribunal would show that by its approach it is making the Explanation appended to Section 271(1) nugatory and that it was trying to go behind/beyond the order of the assessment which had attained finality. He also submits that after remand of the matter by the High Court the assessee was duty bound to produce further material before the Tribunal

to show that its case was falling within the Explanation appended to Section 271(1) and if such material was not produced then penalty proceedings could not be quashed.

7. The High Court, in the earlier decision, has observed that, the Tribunal did not examine the question whether the income returned by the assessee was bonafide and proper, the facts and circumstances which weighed with the Inspecting Assistant Commissioner were not properly appreciated and considered by the Tribunal, addition made to the total income of the assessee on account of the book results disclosed by the assessee not being amenable to verification was not the sole ground for basis on which penalty was levied by the Inspecting Assistant Commissioner, the past history of assessee's persistence in maintaining the books of accounts in the same manner though they were found unreliable was one of the factors which had gone into consideration in levying penalty, and this factor had been completely overlooked by the Tribunal while setting aside the order of the Inspecting Assistant Commissioner and cancelling the penalty imposed by him.

8. We have gone through the order passed by the Tribunal. With due respect to the Tribunal, we must say that it has ignored the mandatory direction issued by this Court. Not only this, it has conveniently ignored the

observations made by this Court by not taking into consideration the findings recorded by the Inspecting Assistant Commissioner and the reasons which persuaded him to culminate the proceedings against the interests of the assessee, the Tribunal also did not consider the effect of and the fact that the assessee was persisting in maintaining the books of accounts in the same manner which were, for the earlier assessment years, found unreliable. Unfortunately, the Tribunal, for the reasons best known to it, has observed the order passed by this Court in its complete breach. Section 271 [as applicable], necessary for this order, would read as under;

> Sec.271 (1). If the Income Tax Officer or the Appellate Assistant Commissioner, in the course of any proceedings under this Act, is satisfied that any person____
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> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income,
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> he may direct that such person shall pay by way of penalty,__
>
> (iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum

which shall not be less than twenty per cent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income.'

*Explanation.*___ Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this *Explanation* referred to as the correct income) as assessed under section 143 or section 144 or section 147 (reduced by the expenditure incurred bonafide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of

such income for the purpose of clause (c) of this sub-section.'

9. After considering the pros and cons and the foundation on which the penalty proceedings were

commenced, the High Court recorded its opinion that the assessee was a persistent defaulter for earlier years, it did not submit its income-tax returns, and every year there was an addition to the income by way of some percentage. The High Court observed that, if that was so, then this conduct of the assessee ought to have been taken into consideration by the Tribunal. Explaining the scope of Explanation, the High Court observed that, if the assessee fails to discharge the burden cast upon him that the action was bona fide, then the Explanation would not provide any protection, and the penalty proceedings would be held to be valid.

10. In the present matter, after the remand by the High Court, the parties did not lead any evidence, the assessee did not produce any further material to show that his action was bona fide or it was not making any misrepresentation, or there was no gross or wilful neglect on its part. The Tribunal had simply held that the Inspecting Assistant Commissioner could not rely upon the report of the Auditor when the report observed that the sale slips for a particular day could not be produced as the slips were thousands in number. The Tribunal also observed that there was material lacuna in the assessment proceedings less realising that the assessment proceedings came to an end, they attained finality as the assessee was feeling content. The assessment proceedings and the order framed by the

Assessment Officer, adding 20% income to the returned income, was never challenged by the assessee. This was not a case for one year only but it was a repeated and persistent manner in which the accounts were maintained. The Audit Report was relied upon by the assessee himself and on the strength of that Report he wanted to show to the Assessing Officer that the returned income was properly shown and there was no concealment. We could understand that there was a bona fide mistake or lapse on the part of the assessee and that there was no fraud or gross or wilful neglect on its part if the case was for one year only. If for six years the accounts were maintained in the same form and every year assessments were framed with the help and assistance of Section 145(1) of the Act, then at least some order should have worked as an eye-opener for the assessee. Every year the assessee was repeating the same trend and still it wanted to say that it had not concealed the income or there was no fraud or gross or wilful neglect on its part.

11. Assuming for a minute that there was no fraud on its part, but present would be a case where the Returned income was not properly shown because of the gross and/or wilful neglect on the part of the assessee. If for the first year, the Assessing Officer held that the manner in which the accounts were maintained was not proper, then

the accounts were required to be maintained properly for the following years. In any case, if six lapses have been committed by the assessee, that too on the same line, then it would be a gross and/or wilful neglect on its part.

12. The Tribunal, on on side, was referring to the observations of the Court to the effect that the assessee had failed to discharge the burden which lie on it under the Explanation but on the other hand the Tribunal held that the burden was upon the Revenue to prove that the assessee was guilty of fraud or gross or wilful neglect. This approach of the Tribunal is patently perverse. On neglect, the Tribunal observed that there was no gross or wilful neglect on the part of the assessee this again was illegal. The Tribunal was also unjustified in holding that the matter could be decided on the strength of the material available in form of diaries. If the income had to be assessed under Section 145(1), then the presumption would be that the income was not properly Returned and if the very same conduct is repeated for the following years, then there is no escape from the clutches of the words 'gross/wilful neglect' on the part of the assessee. Even otherwise, the Tribunal was unjustified in holding that imposition of the penalty may not be possible for a particular assessment year in view of the persistent neglect for past years.

13. Taking into consideration the totality of the circumstances, the observations made by this Court, in the earlier proceedings between the same parties for the same years, we are of the opinion that the Tribunal was unjustified in interfering in the matter.

14. The Reference is answered in favour of the Revenue. The order passed by the Tribunal is quashed.

The Reference stands disposed of accordingly. No costs.

[R.S. Garg, J.]

[M.R. Shah, J.]

RMR.